IN THE

SUPREME COURT OF MISSOURI

No. 84563

SIX FLAGS THEME PARKS, INC.,

APPELLANT,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

RESPONDENT.

ON PETITION FOR REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE SHARON M. BUSCH, COMMISSIONER

REPLY BRIEF OF APPELLANT

BRYAN CAVE LLP
Juan D. Keller, #19864
Edward F. Downey, #28866
B. Derek Rose, #44447
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102-2750
Telephone: (314) 259-2000
Facsimile: (314) 259-2020
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Missouri Cases

Missouri Statutes

Missouri Regulation

Director's Letter Rulings

ARGUMENT

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE DENIAL OF THE REFUND CLAIM BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT APPELLANT'S SALES AT RETAIL TO OUT-OF-STATE CUSTOMERS OF ADMISSION TICKETS ORDERED BY PHONE OR MAIL, AND DELIVERED OUTSIDE MISSOURI BY UNITED STATES MAIL OR COURIER, ARE EXEMPT IN COMMERCE SALES UNDER SECTION 144.030.1.

Introduction

Six Flags' ***retail sales*** of Admission Tickets and Season Passes to out-of-state purchasers are exempt in-commerce retail sales under Section 144.030.1[1] because importation is an essential feature ***of the sales*** (App. Br. 17-22). The Director never directly addresses that argument in her brief. Rather, the Director attempts to divert this Court's attention from the retail sale and onto the customer's use, if any, of the Admission Tickets and Season Passes. The Director's argument is without merit because it is grounded upon a false premise.

The Director asserts that the taxable event is the actual admission of customers into the Eureka Facility, rather than the ***retail sales*** of the Admission Tickets and Season

---

[1] All statutory citations are to the 2000 Revised Statutes of Missouri.

Passes by Six Flags to its customers outside of Missouri. This assertion is inconsistent with the applicable statutes, this Court's interpretations of those statutes, the stipulated record, and the Director's own regulations.

A. The Retail Sales Are the Taxable Event.

1. Missouri Statutes Demonstrate that Retail Sales are the Taxable Event.

Six Flags invokes the in-commerce exemption for "such ***retail sales*** as may be made in commerce between this state and any other state of the United States[.]"[2] Section 144.030.1. Section 144.020 imposes tax on certain sales "***at retail,***" including "the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement[.]" Section 144.010.1(10)(a) defines "***sales at retail***" with respect to the so called "amusement tax": "Sales of ***admission tickets,*** cash admissions, charges and fees to or in places of amusement[.]"

In this case, the sales of Admission Tickets to addressees outside of Missouri did not involve payments for immediate admission and therefore were not sales of "cash admissions." Instead, the sales at issue were "sales of admission tickets." A "ticket" is a "certificate, evidence or token of a right (as admission to a place of assembly, of passage in a public conveyance, of debt or of a chance)." *Ryder Student Transportation Services, Inc. v. Director of Revenue*, 896 S.W.2d 633 (Mo. banc 1995) (*citing* Webster's Third New International Dictionary 2389-90 (1981)). In *Ryder*, the Director argued that a comparable tax provision, Section 144.020.1(7), imposed a tax not on "interstate

[transportation] tickets" as the statute expressly provided, but on the transportation service. This Court rejected that claim:

> "The short response to that argument is that had the legislature intended to impose a sales tax on all charges for bus rides … the legislature was free to use clear language to do so. Instead, it chose to impose a tax only on the sale of tickets."

The Director does not even discuss *Ryder*. The Commission purported to distinguish *Ryder* by claiming that it addressed "transportation tickets" rather than "admission tickets," but that is a distinction without a difference. The legislature expressly chose to impose the tax at issue on retail sales of admission tickets. The Director's attempt to rewrite the statutes is invalid. Because the taxable event is the retail sale of admission tickets, the issue is whether those sales were made in commerce.

2. The Director's Attempts to Recharacterize the Transactions Are Unavailing.

In order to avoid the clear statutory provisions that impose Missouri sales tax on the retail sale of admission tickets, the Director attempts to recharacterize Six Flags' transactions with its customers in a manner that is contrary to the stipulated facts in this case. Specifically, the Director states that the customer must enter Missouri to "fully consummate the transaction between Six Flags and its customers" (Dir. Br. 14), and that the "transaction is not complete until Six Flags performs by providing consideration for the paid admission fee—that consideration is admittance to the amusement park in

---

[2] Emphasis added here and throughout, unless otherwise noted.

Eureka, Missouri" (Dir. Br. 15). This characterization of the "transactions" is demonstrably false.

The stipulated record provides that after an Admission Ticket or Season Pass was physically transferred to and received by a customer, the risk of theft or loss was borne by the customer (L.F. 36). Thus, a customer who did not gain admission to the Eureka Facility after purchasing a ticket, whether due to theft, loss, or any other reason, was entitled to no refund from Six Flags. Therefore, contrary to the Director's argument before this Court, the contractual rights between Six Flags and its customers are fixed upon the retail sale of the Admission Tickets and Season Passes.

3. The Director's Own Regulation Belies Her Argument Here.

The Director's own regulation, a regulation she understandably did not cite to this Court, is contrary to her argument before this Court in this regard. Specifically, 12 CSR 10-3.176, entitled "Fees Paid in or to Places of Amusement, Entertainment or Recreation," provides that tax on "sales of ***all tickets***, including season tickets, ***shall be collected and remitted by the seller at the time payment for the tickets is received***." The example set forth in 12 CSR 10-3.176(3) demonstrates that the retail sale of the ticket, and not the actual admission to the place of amusement, is the taxable event:

> "(3) Example: A season ticket holder pays five hundred dollars ($500) for a season ticket entitling him/her to attend all home games of a team. The tax is computed on the five hundred dollar ($500) admission, ***whether or not the holder attends the games*** and

regardless of the price at which the seat would have been sold for individual games."

Therefore, it is clear that, when it suits her, the Director agrees that the taxable event is the retail sale of the admission ticket. Moreover, if actual admission, rather than the retail sale of the admission ticket, was the taxable event, the Director would owe refunds of sales tax on the "retail sales" that do not result in actual admissions.[3]

B. The Retail Sales of Admission Tickets are In-Commerce Sales.

1. The Retail Sale of Admission Tickets Constitute In-Commerce Sales Whether Characterized as Retail Sales of Tangible Personal Property Or As Retail Sales of a Taxable Service.

In her brief, the Director claims that "Six Flags wants this Court to pigeon-hole the transaction between it and out-of-state customers as a sale of tangible personal property to claim the Section 144.030.1 exemption" (Dir. Br. 14). To the contrary, it was the Commission that held that the in-commerce exemption applied only to retail sales of tangible personal property.[4] Six Flags' claim in this regard in not based upon a characterization of the transactions as retail sales of tangible personal property. Indeed,

---

[3] One is left to speculate whether the Director would ultimately collect less tax if her theory of taxability is accepted; many tickets to sporting events go unused.

[4] Six Flags is at a loss to understand how the Director can dispute that the Commission so held (Dir. Br. 15-16). (footnote continued on next page)

Six Flags challenged the Commission's conclusion, as stated in Six Flags' opening brief (App. Br. 17): "[r]egardless whether these retail sales are of tangible personal property or of a service, these retail sales are exempt under Section 144.030.1[.]" The Director, then, spends the bulk of her brief ignoring the critical focus, the ***retail sales***, and instead debating the "true object" of the retail sales.

Section 144.030.1's exemption applies to "such ***retail sales*** as may be made in commerce[.]" There is no indication that the exemption applies only to sales of tangible personal property, as the Commission apparently concluded (L.F. 42-43). Moreover, Section 144.010.1(10) is clear that "sale at retail" includes the sale of the taxable services enumerated in Section 144.020. Because the legislature is presumed to have known of its own definition of "sale at retail," it is presumed to have intended the term "retail sales" as used in the in-commerce exemption to include the in-commerce retail sales of taxable services. The Director apparently agrees that Section 144.030.1's in-commerce exemption is not limited to the retail sale of tangible personal property. Although she never admits as much, what other explanation can be given for the Director's substantial effort to recharacterize the Commission's decision on this point (Dir. Br. 15)?

At page 11 of its decision, the Commission expressly stated, "[a] payment to a place of amusement in Missouri is not a transaction in commerce between the states, as the object of the transaction is the amount paid for admission in Missouri, ***which is taxable as a service in Missouri***."

The Director apparently believes that if the retail sales of admission tickets constitute sales of tangible personal property, the sales are exempt in-commerce sales because the transfer of title or ownership of such tickets occurred outside of Missouri. *Bratton Corporation v. Director of Revenue,* 783 S.W.2d 891, 893 (Mo. banc 1990). Yet the Director argues that if these same retail sales are of a service, they would not qualify for exemption simply because the bargained-for service would be provided in Missouri, if provided at all. The Director's argument is without merit.

As stated in Six Flags' opening brief, this Court in *Western Trailer Service, Inc. v. Lesage*, 575 S.W.2d 173, 174 (Mo. banc 1978), concluded that Section 144.030.1 exempted retail sales that included "a dealing between persons of different states in which importation … was an essential feature or … ***formed a component part of the transaction***." The Director concedes in her brief that "[m]ailing the ticket or pass is merely a component of the transaction" (Dir. Br. 13). Thus, on this admission alone, Six Flags' sales of Admission Tickets and Season Passes are exempt under Section 144.030.1.

Nonetheless, the Director argues that the sales are not exempt under Section 144.030.1 because the mailing is not an "essential feature" of the sale. The Director argues that because the customers are unable to use the Eureka Facility without coming to Missouri, the in-commerce sales exemption cannot apply. In making this argument, the Director confuses the issue. The issue is whether importation is an essential feature of the ***sale at retail***, not whether it is an essential feature of the customers' use of the tickets. As explained in Six Flags' opening brief, and below, the cases addressing the in-

commerce exemption issue were not decided on the basis the Director advances. Indeed, each such case correctly focused on the elements of a retail sale.

In *Lynn v. Director of Revenue*, 689 S.W.2d 45 (Mo. banc 1985), the taxpayer operated an excursion boat that cruised the Missouri River, including some points in Kansas. As noted by this Court, the "obligation to pay" and the "duty to pay" for the excursions arose solely in Missouri, and therefore the transaction was deemed "purely a local transaction." *Id.* at 48. Here, however, the obligation or duty to pay arose outside of Missouri. The retail sales transactions at issue are not purely local, as they are between a Missouri seller and non-Missouri buyers and involve a critical element of importation. If, as the Director argues, the retail sales of a service could not as a matter of law qualify for the in-commerce exemption because the services are to be provided in Missouri, she does not explain the reason this Court focused upon where the "obligation" or "duty" to pay arose.

The Director's discussion of *Branson Scenic Railway v. Director of Revenue*, 3 S.W.3d 788 (Mo. App. W.D. 1999) is similarly off the mark. There, the main issue was whether the retail sale was of an amusement admission or of interstate transportation. The Court concluded that the sale was of an amusement admission. The secondary issue was whether that retail sale was an exempt in-commerce sale. As in *Lynn*, the *Branson* Court concluded that the retail sales were local in nature; unlike here, there was no indication that any aspect of the retail sales transaction occurred outside of Missouri. The implication of *Branson* is that if the retail sales transactions were not entirely local, the taxpayer would have qualified for exemption.

The Director's position here is not only directly contrary to the express terms of Sections 144.020 and 144.010.1(10)(a), as applied to the facts of Six Flags' retail sales of tickets, and her regulation, 12 CSR 10-3.176, as discussed above, but is also contrary to her regulation 12 CSR 10-3.888(9), "Sales 'In Commerce' Between Missouri and Other States" which provide, "Mail order sales to addresses outside of Missouri will be presumed to be non-Missouri retail sales."[5]

In conclusion, Missouri courts have focused on the location of the elements of the retail sale in determining whether a retail sales transaction qualifies for the in-commerce exemption. Six Flags' ***retail sales*** of Admission Tickets and Season Passes by telephone or mail order are in-commerce sales by a Missouri vendor to a non-Missouri consumer through use of the mail. The retail sale is completed outside of Missouri, as evidenced by: (1) the fact that the risk of loss of the ticket is upon the buyers upon delivery to the buyer; and, (2) the fact that the Director taxes the transaction whether or not there is any actual admission to the Eureka Facility. Therefore, these retail sales are "in commerce" and exempt from Missouri sales tax under Section 144.030.1.

---

[5] Neither the Commission nor the Director addressed the impact of these regulations.

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE DENIAL OF THE CLAIM FOR REFUND BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT APPELLANT'S RENTAL OF VIDEO GAMES IS EXPRESSLY EXCLUDED FROM SALES TAX BY SECTION 144.020.1(8).

The lynchpin of Six Flags' argument on this issue is *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999) (App. Br. 23-27). In *Westwood*, this Court determined that Section 144.020.1(8)'s exclusion against double taxation applied to rental payments, even if those payments are made in a place of amusement. The Director entirely ignores that pivotal authority, instead arguing that *Bally's LeMan's Family Fun Centers, Inc. v. Director of Revenue,* 745 S.W.2d 683 (Mo. banc 1988) is controlling because there this Court concluded that a video arcade was a place of amusement (Dir. Br. 22-23). Six Flags does not dispute that the Eureka Facility is a place of amusement; *Bally's* is clearly inapposite.

The Director also argues that the patrons' use of the Video Games does not qualify for Section 144.020.1(8)'s exclusion because their use does not rise to the level of a rental or lease (Dir. Br. 24-25). That argument is contrary to *Westwood*, to the plain meaning of the terms "rental" and "lease," and, as discussed below, is contrary to a number of the Director's letter rulings on that issue. Further, the Director argues that Six

Flags did not overpay sales tax on the Video Game rentals, because Six Flags was not the owner of the games and was not the person who had paid tax on the purchase of the games (Dir. Br. 24). Last, the Director argues that the 1999 enactment of Section 144.518 evidences that the legislature intended to tax the rentals prior to 1999 (Dir. Br. 25-26). As explained below, each of these arguments is without merit.

A. *Westwood* Controls.

In *Westwood*, this Court determined that the express exclusion from double taxation set forth in Section 144.020.1(8) "trumps" Section 144.020.1(2), the provision upon which the Director relying here, and upon which she relied in *Bally's*. This Court reasoned that Section 144.020.1(8) was controlling where there is overlap with Section 144.020.1(2) because the former section is more specific than the latter. Accordingly, this Court determined that fees for the rental of golf carts were expressly excluded from tax by Section 144.020.1(8), because tax was paid at the time of purchase, even though the country club was admittedly a place of amusement. Therefore, because Section 144.020.1(8) applies, it does not matter that the Eureka Facility is a place of amusement.

B. The Patrons Rent or Lease the Video Games.

The Attorney General argues that the patrons' use of the Video Games does not constitute a "rental" or "lease" of tangible personal property. In support of this proposition, the Director cites the definition of lease in Section 400.2A-103(1)(j). However, other than to say that the application of the term "lease" to a Video Game is "unrealistic" (Dir. Br. 25), the Director never explains why the transactions would not be "leases" under Section 400.2A-103(1)(j). Clearly, the patrons receive a "right to

possession and use of goods for a term in return for consideration[.]" That is all the cited statute requires. The Director's argument is also inconsistent with *Westwood*, where this Court concluded that the use of a golf cart for nine or eighteen holes was a rental or lease. This Court also recognized that the exclusion, as part of a tax statute, should be strictly construed in the taxpayer's favor. *Id*., fn 6. Furthermore, ***even the Director*** rejects the argument that the Attorney General is making on her behalf in this case, as demonstrated by a review of her letter rulings.

For example, in L8762 (Feb. 9, 1996), attached as Appendix 1, the Director responded to a letter ruling request from a hotel. The hotel provided to hotel guests pay-per-view entertainment on television sets located in the hotel rooms. The entertainment included both movies and ***video games.*** Video games were provided by means of access to remote central CD-ROM units that were linked by wire to the television sets and hand controllers located in the hotel rooms. The Director concluded in L8762 that "[t]o the extent that selection of a particular movie or video is limited to one hotel guest at a time, ***the transactions are not services but the rental (lease) of tangible personal property***." The Director reissued the ruling to another taxpayer, virtually verbatim, in L9931 (Sept. 5, 1997), attached as Appendix 2. Thus, contrary to the Director's argument here that it is not "realistic" to "lease" the Video Games, it is clear that her policy has been that the usage of video games, even when the patrons only remotely possess the CD-ROM units, fits within the definition of a "lease" for Missouri sales tax purposes.

Moreover, the Director's "realism" is not limited to video games. In L10222 (Feb. 13, 1998), attached as Appendix 3, the Director concluded that the owner of airport and

shopping mall baggage carts could elect to pay Missouri sales tax on the purchases of such carts and forego collecting Missouri sales tax on the "lease" of such carts, citing Section 144.020.1(8). As set forth in the letter ruling, the carts were used for five to ten minutes. Under these circumstances, and despite the issues of "limited control" and the "common sense concept of possession" (Dir. Br. 25) raised by the Director here, and the fact that the carts remained within the airports and shopping malls throughout the rental, the Director determined that those transactions constituted leases within the meaning of Section 144.020.1(8).

In short, the Director's claim that the usage of the Video Games cannot be "realistically" described as a "lease" within the meaning of Section 144.020.1(8) is belied not only by *Westwood*, but by her own letter rulings.[6] In conclusion, the patrons' exclusive temporary use of the video games is a rental or lease of the games within the meaning of *Westwood* and is consistent with the Director's historical enforcement of the sales tax law.

C. The Owner of the Video Games Is the Lessor.

The Director argues that because Six Flags does not own the Video Games, and was not the one who paid sales tax on the purchase of the games, Section 144.020.1(8)'s

---

[6] Once again, one wonders whether the Director, in her zeal to win the battle, is not conceding the war. The record does not disclose the potential loss of tax collections on video rentals at hotels as a result of the Director's attempt to change policy in this case.

exclusion does not apply. Six Flags did not address this issue in its opening brief because it was not raised before the Commission or in the Commission's decision (L.F. 44-45) and was first briefed by the Director in her brief to this Court. In any event, the Director's argument on this issue falls flat because the lease of the Video Games was between the Owner of the Video Games and the users of the games, not between Six Flags and its patrons.

The stipulated facts demonstrate that the Owner contracted with Six Flags to occupy space in Six Flags' video arcade. The users of the Video Games rented the Video Games from the Owner, not from Six Flags. This is evident from the fact that the Owner, not Six Flags, owned the Video Games. Since the Video Games belonged to the Owner, they were not Six Flags' to rent to the users of the Games. The payment that Six Flags received from the Owner was not for renting the Games to patrons, but rather was rent for the space in the video arcade, measured as a percentage of Video Game receipts.

The Owner of the Video Games paid Missouri sales or use tax on the Video Games when they were purchased (L.F. 38). Because the Owner, as lessor of the Video Games to patrons using the games, previously paid Missouri sales tax when the Video Games were purchased, the Video Game rental receipts are excluded from tax by Section

144.020.1(8) and this Court's decision in *Westwood*.[7]

D. Section 144.518 Does Not Alter the Result.

The Director's final attempt to avoid the conclusion mandated by *Westwood* is her suggestion that the 1999 enactment of Section 144.518 demonstrates that the legislature understood that Video Game proceeds were subject to tax. Quite the opposite is the case. Section 144.518 does not purport to address the taxability of proceeds from the rental of amusement machines. Rather, that section addresses the purchase of such machines and their parts. The exemption in fact acknowledges that the "use" of the machines may not be a taxable event. That is why the purchase of the machines is exempt only if "sales tax is paid on the gross receipts derived from [their] use[.]" The clear implication is that if sales tax is not paid on the receipts derived from their use, as should be the case here, tax is due at the time of purchase. Thus, Section 144.518, if relevant at all, demonstrates that the legislature knew that receipts from the "use" of amusement machines were not always taxable.

In summary, because Missouri sales or use tax was paid upon the purchase of the Video Games, the Video Game rental receipts are not subject to Missouri sales tax.

---

[7] Although the rent the Owner pays to Six Flags for space at the Video Arcade is paid out of the Video Game rental receipts, that fact does not alter the result; the rental receipts are still excluded from tax by Section 144.020.1(8). Nothing in Section 144.020.1(8) nullifies the exclusion based upon what the lessor does with rental receipts.

CONCLUSION

For all of the foregoing reasons, Six Flags' receipts for its in commerce retail sales are exempt from sales tax under the in-commerce exemption, Section 144.030.1, and the receipts for rental of Video Games are excluded from sales tax under the exclusion against double taxation in Section 144.020.1(8). Accordingly, this Court should reverse the Commission with instructions that Six Flags' refund claim be sustained.

Respectfully Submitted,

BRYAN CAVE LLP

Juan D. Keller, #19864
Edward F. Downey, #28866
B. Derek Rose, #44447
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102
Telephone: (314) 259-2000
Facsimile: (314) 259-2020

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing, as well as a labeled disk containing the same, were mailed first class, postage prepaid or hand-delivered this _____ day of October, 2002, to Ron Molteni, Assistant Attorney General, Missouri Attorney General's Office, P.O. Box 899, Jefferson City 65102.

_____

CERTIFICATE REQUIRED BY SPECIAL RULE 1(C)

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Special Rule 1(b). The foregoing brief contains 4,298 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(a) has been scanned for viruses and is virus-free.

_____